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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ELECTRONIC PLATING COMPANY, ROBERT PORCELLI and HARSHAD PATEL,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fourth Amendment to the United States Constitution provides that

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

The Circuit Court of Cook County, Illinois found that multiple warrantless searches of petitioners' private property violated the Fourth Amendment, because the State relied upon a pretext of administrative authority to conduct a criminal investigation. Disagreeing with the trial court, with the United States Supreme Court and with the courts of at least three sister states, the Illinois appellate court reversed, condoning the State's pretextual searches and holding that the State's actions did not violate the Fourth Amendment.

The question presented for review is: Whether *California v. Greenwood* creates an exception to the Fourth Amendment prohibition against pretextual, warrantless searches and seizures of evidence proscribed by *New York v. Burger*.

STATEMENT PURSUANT TO RULE 29.6

Electronic Plating Company, an Illinois corporation, has no parent companies or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Electronic Plating Company, Robert Porcelli and Harshad Patel, respectfully petition for a writ of certiorari to review the judgment and opinion of the Illinois appellate court in this case.

OPINIONS BELOW

The Illinois Supreme Court denied petitioners' Petition for Leave to Appeal on December 3, 1997. The order denying the petition is reprinted in the Appendix at page A25. The opinion of the Illinois appellate court is reported at *People v. Electronic Plating Co., et al.*, 291 Ill. App. 3d 328, 683 N.E.2d 465 (1st Dist. 1997), and is reprinted in the Appendix at pages A1-A12. The memorandum opinion of the Circuit Court of Cook County, Illinois is reprinted in the Appendix at pages A13-A24.

JURISDICTION

The order denying petitioners' Petition for Leave to Appeal to the Illinois Supreme Court was entered on December 3, 1997. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On June 26, 1992, the Metropolitan Water Reclamation District of Greater Chicago ("MWRD") received an anonymous tip concerning the Electronic Plating Company ("EPC") facility located in Cicero, Illinois. EPC operates a metal electroplating business. EPC's operation generates waste, some of which is shipped for disposal off-site, and some of which is lawfully disposed into the sewer. Prior to discharging its waste into the sewer, EPC treats the waste to remove contaminants. The anonymous tip alleged that EPC had installed an underground pipe to bypass the wastewater treatment process at its facility and dispose of waste into the sewer without first removing contaminants. Five days after sending the tip, the informant sent the MWRD a sketch. App. at A26. This sketch showed the location of the supposed bypass pipe within EPC's building. The tip and sketch were routed to the supervisor of MWRD's North Central Section. App. at A2, 13.

Three months later, the same supervisor of MWRD's North Central Section sent MWRD Agent James Waclawik to the EPC building on a Saturday, without a warrant, to search the facility. On this particular Saturday,

September 26, 1992, and during subsequent searches, Agent Waclawik took a copy of the tip and sketch with him. Agent Waclawik testified that a purpose of his first visit to EPC was to corroborate the anonymous tip. During his September 26th visit, Agent Waclawik and an assistant also laid the groundwork for the MWRD's criminal investigation by installing an automatic sampling machine inside EPC's production building, at a location dubbed "Station 1-A." The MWRD led EPC to believe that this machine was being installed simply as part of a "routine" inspection program applicable to all regulated companies in the district. App. at A2-3, 13-14.

The machine Waclawik installed retrieved water samples from EPC's plumbing system at regular, periodic intervals. The sampling machine automatically put each of those samples into separate bottles, which were stored in a tray attached to the sampling machine. The tray held ninety-six sample bottles. The samples were taken in minute increments, effectively affording the MWRD the equivalent of twenty-four hour-a-day access to the EPC facility, without a warrant, without an administrative order and without the petitioners' informed consent.

The samples collected from Station 1-A contained no significant amounts of contaminants. Therefore, on October 21, 1992, Agent Waclawik's supervisor, Allen Giedraitis, gained access to the main sewer line under 54th Street in Cicero, Illinois. Here, under a public right-of-way, Agent Giedraitis collected water samples both upstream and downstream from the EPC building in an effort to confirm the allegations in the anonymous tip. Agent Giedraitis did not enter the EPC building to collect these samples. Agent Giedraitis testified that since he was unable to corroborate the anonymous tip

with either the samples collected from Station 1-A or the samples which he collected from the public sewer, he decided to continue the investigation inside EPC's building.

On October 27, 1992, in furtherance of the ongoing criminal investigation, Giedraitis directed Agent Waclawik to return to EPC, again without a search warrant, for the purpose of secretly planting *another* sampling device inside of EPC's building. Knowing that EPC employees believed Station 1-A would be the MWRD's only sampling point inside of the EPC building, Agent Waclawik covertly installed a twenty-four foot extension on the automatic sampler he had previously installed at Station 1-A. This new device — code-named "Station 1ADN1" — created a separate sampling point inside the EPC plumbing system underneath the concrete floor of EPC's building. Agent Waclawik admitted that the purpose of installing this second device was to investigate the existence of the alleged bypass pipe which the tipster had described. Installation of the secret probe was done without a warrant, without an administrative order and without petitioners' knowledge, permission or informed consent. The samples collected at the sampling machine at Station 1-A were actually being taken from the secret Station 1ADN1 and stored in the collection tray for retrieval by the MWRD. App. at A14.

Agent Waclawik subsequently returned to EPC on at least ten separate occasions between October 27 and November 12, 1992, pretending each time that his presence in EPC's building was merely a "routine" event. Agent Waclawik admitted to the trial court, however, that his sole purpose for the repeated searches was to retrieve the sample bottles containing water collected

from the secret extension probe. On each occasion from October 27, 1992 to November 12, 1992, the State concealed the real purpose of the visit. In fact, the MWRD affirmatively lied to EPC, claiming that the purpose of the visits was simply to perform "routine service" of the automatic sampler at Station 1-A. As noted in Waclawik's written investigative reports, whenever EPC employees appeared to be suspicious, Agent Waclawik altered his behavior or let a day or two pass to avoid being caught. By the time the MWRD's covert operation was completed on November 12, 1992, the State had seized 964 sample bottles from EPC's building and had documented detailed observations of EPC's plumbing and electrical systems. App. at A4, 14-15.

On November 13, 1992, *after* completing its series of warrantless searches, the MWRD finally sought and obtained a warrant to search the EPC building. Executing the warrant, state agents once again searched the EPC premises. After escorting several EPC employees to the grand jury to testify, the State sought an indictment of petitioners. The State did not indict petitioners for any significant criminal conduct on the day the warrant was executed, but rather for alleged criminal conduct that had occurred on the days when the 964 secret samples had been collected by the surreptitious sampling probe.

Petitioners moved to suppress all of the evidence seized. Following five days of evidentiary hearings on petitioners' Fourth Amendment claims, the trial court issued its Memorandum Opinion and Order granting petitioners' motion and suppressing all evidence obtained as a result of the repeated warrantless searches. The trial court, relying upon Fourth Amendment interpretations adopted by this Court and courts in Illinois and

New York, specifically found that the MWRD improperly had conducted a criminal investigation under the pretextual guise of "routine" administrative inspections, in derogation of the well-established rules of law announced in *Michigan v. Tyler*, 436 U.S. 499 (1978) and *New York v. Burger*, 482 U.S. 691 (1987). App. at A15, 18-23.

The appellate court declined to follow *Tyler* and *Burger* and reversed. The appellate court instead characterized the facts below in terms of *California v. Greenwood*, 486 U.S. 35 (1988), and found neither a search nor a seizure by the MWRD agents. In effect, the appellate court created a *Greenwood* exception to the *Burger* doctrine to avoid the administrative pretext prohibition of the Fourth Amendment.

REASONS FOR GRANTING THE PETITION

This petition comes before the Court from a case in which State agents admittedly lied to petitioners to gain access to a private building and to conduct a series of surreptitious warrantless searches. Finding that the State of Illinois intentionally violated petitioners' expectations of privacy by using its allegedly "routine" administrative authority as a pretext for the criminal investigation, the trial court suppressed all fruits of the warrantless searches, following *New York v. Burger*. The appellate court, however, reversed by crafting an exception to *Burger* which this Court cannot have intended.

The appellate court's decision below departs sharply from Fourth Amendment authority on warrantless searches and dangerously erodes constitutionally protected privacy interests. The decision below also runs con-

trary to decisions of appellate courts in New York, Ohio and Massachusetts, all of which have interpreted the Fourth Amendment in a manner consistent with *Burger* on strikingly similar facts. In departing from prior Fourth Amendment cases, the court below has created an illogical and unworkable rule of law which will prevent uniform application of the Fourth Amendment.

In essence, the court below has reasoned that the State may rely upon an administrative pretext to gain access to an otherwise inaccessible building if the criminal investigation which the State conducts while inside that building is not a "search" because petitioners supposedly had no expectation of privacy in the place searched under *Greenwood*. The fatal flaw in that logic is that if petitioners truly had no privacy interest in the building, then the use of an unconstitutional pretext to gain access to the building would have been unnecessary. Instead of adopting a rule of law which would avoid such an irreconcilable dichotomy and preserve the integrity of the *Tyler* and *Burger* doctrines, however, the court below held that the supposed absence of a privacy expectation legitimized the pretextual searches. These important constitutional and public policy issues support petitioners' prayer that this Court grant their petition for writ of certiorari.

I. THE DECISION BELOW IS AT ODDS WITH FOURTH AMENDMENT DECISIONS IN THREE OTHER STATES AND WILL LEAD TO INCONSISTENT APPLICATION OF A CONSTITUTIONALLY SECURED RIGHT

The basic rule of Fourth Amendment jurisprudence followed by this Court was set forth definitively in *Katz*

v. United States, 389 U.S. 347 (1967). The rule of law in *Katz* provides that

> The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

Katz, 389 U.S. at 357. This Court also has made clear that an administrative inspection scheme may not be used as a pretext to search for evidence of criminal violations. *Michigan v. Tyler*, 436 U.S. 499 (1978). Nevertheless, the repeated warrantless searches conducted by the State in this case were based on an administrative pretext and done without prior approval, permission or informed consent, or in the exercise of administrative regulation. *See New York v. Burger*, 482 U.S. 691 (1987). The appellate court's decision to condone the State's warrantless searches with the rationalization that the criminal investigation involved neither searches nor seizures runs contrary to accepted constitutional interpretation.

A. The Fourth Amendment Analysis Followed by the Illinois Appellate Court Conflicts with Fourth Amendment Analysis in Three Other States.

The seminal issue is whether an administrative agency charged with the authority to oversee regulation of the public sewer system can use that authority as a pretext for a criminal investigation of sewer uses. In *New York v. Burger*, 482 U.S. 691 (1987) this Court essentially said no. Three other states have followed *Burger* in the en-

suing decade; Illinois now has declined to do so. Thus, the Illinois appellate court's decision not only is contradicted directly by *Burger* itself, but it diverges from the uniform interpretation of *Burger* by state courts in at least three other jurisdictions. The analysis in those decisions highlights the critical error in the appellate court's holding below.

The central premise of the decisions from New York, Massachusetts, and Ohio is that if the State suspects a criminal violation, it may not use an administrative pretext to search private property and circumvent the warrant requirement of the Fourth Amendment. Although those decisions were brought to its attention, the Illinois appellate court chose not to follow *Burger*, and instead read *California v. Greenwood*, 486 U.S. 35 (1988), as an exception to the *Burger* rule. Certiorari should be granted to correct the unique approach adopted by the Illinois court and to harmonize the ruling with the decisions of this Court and the courts in several other states.

In *New York v. deWit*, No. 88-38 slip op. (N.Y. County Ct., Feb. 16, 1989), *aff'd* 550 N.Y.S.2d 820, 156 A.2d 973 (December 20, 1989), the New York Supreme Court, Appellate Division, refused to ignore *Burger's* restrictions on a state agency's pretextual administrative investigation. In *deWit*, defendants were charged with the illegal disposal of pesticides. Prompted by an anonymous "tip," and without a warrant, a state inspector visited defendants' premises and obtained water samples. As a result, defendants were charged with several environmental crimes. Following indictment, the defendants moved to suppress the State's lab analysis results. The trial court granted defendants' motion to suppress and the appellate

court affirmed. *Id.*, slip op. at 14. The *deWit* court compared the facts to those in *Burger* and concluded:

> [T]he *Burger* decision does not stand for the proposition that state officers can enter upon commercial premises, albeit a pervasively regulated business, under the guise of a routine administrative inspection, if there was *prior* suspicion of criminal activity, for the purposes of securing evidence for criminal prosecution.

Id., slip op. at 7-8.

The appellate court below also declined to follow the decision in *Commonwealth v. Krisco Corp.*, 421 Mass. 37, 653 N.E. 2d 579 (1995). The defendants in *Krisco* operated an auto body shop and were accused of illegally disposing of paint waste into a dumpster located on company property behind the shop. The State learned of the disposal via an anonymous tip by a former company employee and commenced surveillance of defendants' facility from a nearby building. Acting on the tip, and on twelve separate occasions thereafter, a State inspector observed and videotaped activities at the rear of defendants' facility without a search warrant. Three months after this surreptitious surveillance began (and immediately after observing defendants placing waste in their dumpster), a State inspector entered the shop and announced she was there to conduct an inspection. As part of her search, the inspector climbed into defendants' dumpster and retrieved discarded cans of paint. The evidence she seized formed the basis for the indictment.

The trial court granted defendants' motion to suppress the evidence seized from the dumpster and held that the warrantless search "could not be justified as an administrative search under a theory of consent to search or as

a search based on exigent circumstances." *Commonwealth v. Krisco*, 421 Mass. at 41. Based on its location and the fact that access to the area containing the dumpster was restricted, the trial judge also disagreed with the state's contention that the defendants lacked a reasonable expectation of privacy in the dumpster that would preclude protection under the Fourth Amendment. *Id.* The trial court specifically found the search "was not a valid administrative search, but rather a criminal investigative search using [the state statute] as a subterfuge to avoid the burden of obtaining a warrant." *Id.*, at n. 3. Relying upon *California v. Greenwood*, the Massachusetts Supreme Court affirmed the trial court's ruling in all respects. *Id.*, at 48.

In *Ohio v. Denune*, 82 Ohio App. 3d 497, 612 N.E.2d 768 (1992), the defendant and his business, Dixie Distributing, were indicted for illegal storage, transportation and disposal of a hazardous waste. The Ohio Environmental Protection Agency ("OEPA") had received an anonymous tip that defendant was going to move a tractor trailer containing PCBs from his warehouse on the eve of a scheduled inspection. To confirm the tip, investigators followed the trailer to a salvage yard more than sixty miles from the business. Once there, OEPA agents located and looked into six *other* defendant-owned trailers containing fifty-five gallon drums. Based on what they had observed in the other trailers, the agents then broke into the newly arrived trailer and found evidence of PCBs and an unlabeled fifty-five gallon drum. Indictments based on evidence seized from all of the trailers followed.

The defendant filed a motion to suppress the seized evidence. The trial court denied defendant's motion to

suppress based in part on the assumption that OEPA's authority to inspect eliminated the need for a search warrant. Defendant appealed his subsequent conviction and ascribed error to the trial court for denying his motion to suppress. The Ohio Court of Appeals reversed. *Denune*, 82 Ohio App. 3d at 504-505. In rejecting OEPA's authority to search, the court found nothing that "can be fairly read to abolish the warrant requirements for searches." *Id.* at 506. Declining to follow the trial court's reasoning, the appellate court noted that "an agency of the state may not be used as a surrogate for the police to obviate the constitutional duty of obtaining a search warrant." *Id.*

The similarities between each of these cases and what occurred at EPC are compelling. The tips, the repeated surveillance, the pretextual administrative search and the failure to obtain a warrant or informed consent all are hallmarks of the factual predicates which are at the heart of the *Burger* doctrine. The decisions in *deWit*, *Krisco* and *Denune* properly applied *Burger*, even in the face of *Greenwood* arguments, and support the reasoned analysis of the trial court and its order suppressing all of the evidence seized.

The appellate court below chose to discuss only one of these cases — *Krisco* — and concluded that Krisco's expectation of privacy in the dumpster outside of its building somehow exceeded EPC's expectation of privacy in the plumbing inside of its building. Contrary to the decisions from its sister states which harmonized *Tyler* and *Greenwood* by following *Burger*, however, the appellate court below relied entirely upon the "garbage" exception of *Greenwood* to remove all constitutional restrictions on the MWRD. Its factually unsupported creation of an

"irretrievably lost" exception to *Burger* goes one step beyond constitutional boundaries and invites state law enforcement officials to bypass established warrant procedures. New York, Massachusetts and Ohio say that this is not what the Fourth Amendment allows. Illinois has sent a contrary signal. Petitioners request this Court to resolve the conflict before two distinct lines of Fourth Amendment jurisprudence develop, one of which will be incorrect.

B. Federal Interpretation of Analogous Fourth Amendment Issues is Consistent with the Trial Court's Finding.

The appellate court's decision also is inconsistent with well-established constitutional guidelines which have been found to apply in analogous situations before this and other federal courts. This Court, as well as the lower federal courts, frequently has held that even seizures of evidence in "plain view" are constitutionally prohibited if the State has no authority to be present in the location from which the evidence is seized. This Court has found that an "essential predicate" for a warrantless seizure under the plain view doctrine is that the searching officer "cannot violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California*, 496 U.S. 128, 136 (1990). The rationale for this rule is that an officer's illegal entry into a private area will not be excused, even if the actual seizure of evidence which the officer takes from that area is otherwise justifiable under the Fourth Amendment.

Here, the MWRD did not have a lawful right to be present in the EPC building to conduct a criminal investigation regarding the "tip" it received. *Horton* and

other decisions interpreting the Fourth Amendment concerning the "place searched" support the majority view law from which Illinois has now departed. *See Soldal v. Cook County*, 506 U.S. 56, 66 (1992) ("in the absence of consent or a warrant permitting the seizure of the items in question, such seizures can be justified only if they meet the probable cause standard and if they are unaccompanied by unlawful trespass") (citations omitted); *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987) (requiring probable cause to seize items found in plain view); *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971) ("the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges"). *See also United States v. Charr*, No. 96-2316, 1998 WL 51293, at *9, n. 6 (6th Cir., February 11, 1998) (because police officers had no lawful right of access to place searched, search and seizure was unlawful). Certiorari should be granted to bring Illinois law back into line with this general rule.

II. THE APPELLATE COURT'S FOURTH AMENDMENT ANALYSIS MISCONSTRUED THE NATURE OF THE STATE'S "SEIZURE" AND THE PETITIONERS' PRIVACY INTEREST IN THE LOCATION "SEARCHED"

Recognizing that the place which the State actually searched, and the place from which the State removed the suppressed evidence, was the EPC building, the trial court found that the State's warrantless searches violated petitioners' objectively reasonable expectation of privacy in that building. App. at A22-A24. In contrast, the appellate court held that the MWRD's warrantless

entries into EPC's building to seize 964 water sample bottles did not violate petitioners' objective expectations of privacy and therefore did not implicate Fourth Amendment concerns. App. at A9. The appellate court's holding, however, flows from an unrealistically narrow and factually incorrect definition of the "place searched" as the public sewer, rather than the room inside the EPC building from which the State actually seized the evidence. The appellate court's rationale also ignores the fact that the MWRD agents literally sneaked into EPC's building to conduct their searches and to seize the bottles which formed the basis for the indictment.

The first element of any Fourth Amendment analysis is to determine whether there has been a "search." A Fourth Amendment "search" occurs "when an expectation of privacy that society accepts as reasonable is infringed." *Maryland v. Bacon*, 472 U.S. 463, 469 (1985), *citing United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Rawlings v. Kentucky*, 448 U.S. 98, 100 (1980). The second element of a Fourth Amendment analysis is to determine whether there has been a "seizure." A Fourth Amendment "seizure" occurs when "there is some meaningful interference with an individual's possessory interests" in the property seized. *Maryland v. Bacon*, 472 U.S. 463, 469 (1985), *citing United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

The testimony weighed by the trial court demonstrates that the place which the State "searched" was the EPC building, not the public sewer as described by the appellate court. The testimony plainly established that EPC's building was thoroughly explored. In fact, Agent Waclawik confirmed during his testimony that his searches of

EPC's facility had a practically unlimited scope, including tracing wiring systems inside the building, looking through various rooms for electrical switches, looking for evidence of a bypass pipe (using the anonymous informant's sketch as a road map), and seizing from the building 964 bottles containing the previously collected water samples. Those warrantless searches encompassed virtually every area within the EPC building, all of which enjoy Fourth Amendment protection. In contrast, one of the few places that Mr. Waclawik did *not* search during his investigation was the public sewer. That search was conducted by Agent Giedraitis on October 27, and it led him to conclude that a further search inside of the EPC building was preferable to time spent in the public sewers.

Similarly, the evidence "seized" was not "irretrievably" flowing wastewaters as the appellate court apparently assumed, but rather consisted of 964 water bottles sitting in a machine in a private room. The MWRD inspectors gained custody of those bottles (and the water stored in them) by entering EPC's building and physically removing the bottles from EPC's custody and control. Significantly, the MWRD's own Procedural Manual recognizes a company's possessory interest in its water samples by *requiring* that the MWRD offer companies the opportunity to keep at least half of the volume of water in each sample bottle. The MWRD failed to follow its own procedures when MWRD agents took *all* 964 bottles of water collected by the secret probe, concealing the nature of the samples as well as their intent to use the samples in a criminal investigation. The trial court correctly found that the MWRD's seizure, in derogation of its own Procedural Manual, constituted persuasive

evidence that the MWRD was using an "administrative" pretext to avoid its constitutional obligations under *Burger*.

III. *CALIFORNIA v. GREENWOOD* IS NOT AN "EXCEPTION" TO THE *BURGER* DOCTRINE

Until the court below issued its opinion in this case, neither this Court nor any other federal or state court had considered the *Greenwood* "expectation of privacy" line of cases to be an exception to the *Burger* doctrine which flatly prohibits pretextual searches. Indeed, the *Greenwood* and *Burger* doctrines logically arise in mutually exclusive contexts. The *Burger* doctrine applies where officers use deception and administrative pretext to enter an otherwise private, inaccessible and constitutionally protected area. The *Greenwood* analysis, on the other hand, applies when officers search an area that is unrestricted and freely accessible to the general public. The court below has created an unprecedented hybrid theory, however, which treats *Greenwood* as an exception to *Burger*, and which opens the door to a confusing and unworkable line of cases that would erode the constitutional safeguards imbedded in both *Greenwood* and *Burger*.

Not only did the court below incorrectly treat *Greenwood* as an "exception" to the *Burger* doctrine, but it also extended the scope of *Greenwood* far beyond its original bounds. Because it is clear that the "place searched" in this case was not the public sewer but was instead EPC's building, and that the evidence seized was not an "irretrievable" flow of wastewater, but rather the sample bottles, the Illinois appellate court's reliance upon *Green-*

wood was mistaken. *Greenwood* provides that a person who places his garbage on a street curb, freely accessible to the general public, has no objective expectation of privacy in that garbage. *Id.*, at 39-40. The appellate court cites *Greenwood* in support of its conclusion that EPC did not "have a reasonable expectation of privacy in the wastewaters" searched. App. at A12. Yet, even assuming that the bottles seized are analogous to garbage, the tray of sample bottles were located in the equivalent of EPC's kitchen trash bin, not its dumpster (which other states have protected) or its garbage can on the curb (as in *Greenwood*). Unlike the police officers in *Greenwood* who confined their search to the public street, the MWRD agents effectively came into EPC's "kitchen" to retrieve the samples instead of waiting for the garbage to "reach the curb." By doing so, and by entering EPC's building without a warrant, the MWRD violated petitioners' constitutional rights.

The flaw in the appellate court's decision below is highlighted by a hypothetical example based on the *Greenwood* case. First, assume that Greenwood's garbage can on the curb was fed by a construction debris chute attached to the tenth floor of an office building which was being remodeled. As the remodeling project generated waste, the waste would be fed down the chute into the garbage can. Next, assume that the State of California was concerned that Greenwood might be disposing of toxic ceiling tiles, and therefore issued Greenwood a demolition permit conditioned upon the ability to sample the waste that Greenwood sent down the trash chute. Further assume that California installed a sampling machine on the fifth floor of the building to collect the samples. The machine occasionally would retrieve sam-

ples of the debris as it dropped down the chute en route to the garbage can. The samples taken by the machine on the fifth floor were sealed in boxes, returned to the tenth floor, and stored until they could be divided equally between Greenwood and the State for testing. Finally, assume the State secretly entered Greenwood's tenth floor office space where the boxes were stored, and, without a search warrant or prior informed consent, confiscated the sample boxes (including Greenwood's half of the samples) for use in a criminal prosecution.

These modifications to the *Greenwood* fact scenario would bring *Greenwood* in line with this case. Most importantly, they expose the critical difference between the samples which the State seized in this case, and the material in Greenwood's garbage can. EPC's sample bottles were not on a public curb and were not accessible to the public. Indeed, the samples would not even have been accessible to the State had the MWRD agents not lied to gain access to the EPC building. The bottles seized from EPC were *not* "in the garbage can" (*i.e.*, the public sewer), nor were they even on their way down the ten-story trash chute (*i.e.*, the sewer connection pipe) toward the garbage can. Borrowing from the analogy, EPC's bottles were "sitting in the boxes on the tenth floor," safely within the protection of the Fourth Amendment's recognition of legitimate privacy expectations. As this hypothetical illustrates, the appellate court's reliance upon *Greenwood* not only creates an unwarranted exception to the *Burger* doctrine, but it extends the scope of the *Greenwood* doctrine beyond constitutional limitations. Petitioners respectfully suggest that the error can only be corrected by granting the petition for writ of certiorari and reversing the appellate court.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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